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EPA
40 CFR Parts 30, 31, 33, 35, 40
Docket EC-2000-003
RIN 2020-AA39

Participation by Disadvantaged Business Enterprises in Procurement Under Environmental Protection Agency (EPA) Financial Assistance Agreements

AGENCY: EPA, Office of Small and Disadvantaged Business Utilization (OSDBU)

ACTION: Notice of Proposed Rulemaking

SUMMARY: EPA is proposing to revise its Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) Program and rename it as EPA's Disadvantaged Business Enterprise (DBE) Program. EPA is proposing to delete existing MBE and WBE specific provisions in 40 CFR Parts 30, 31, 35 and 40, and is proposing to consolidate and add to these provisions in a new Part 33. Part 33 is intended to harmonize EPA's statutory DBE procurement goal requirements with the United States Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097(1995). In Adarand, the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. In accordance with President Clinton's directive to mend, not end, affirmative action programs, this proposed rule reflects EPA's efforts to ensure that the compelling government interest of remedying past and current racial discrimination through the use of agency-wide DBE procurement goals at EPA is served by a narrowly-tailored program. If you are a recipient of an EPA financial assistance agreement or an entity receiving an identified loan under a financial assistance agreement capitalizing a revolving loan fund, this proposed rule may affect you.

DATES:

Comments: You must send written comments on or before [insert date 60 days after

posting date].

Public hearings: EPA will hold public hearings on this proposed rule on the following dates [insert dates and times and addresses]:
1.
2.
3.
4.
If you wish to speak, contact the person named under the section entitled "For Further Information Contact." Verbatim transcripts of the hearings will be available for reading and copying at the OSDBU Docket (see below).

ADDRESSES:
Comments: Send written comments to the Docket Clerk, Enforcement and Compliance Docket and Information Center (2201A), U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20004 (in triplicate, if possible). Please use a font size no smaller than 12. Comments may also be sent electronically to docket.oeca @ epa.gov or faxed (202)501-1011. Attach electronic comments as an ASCii (text) file, and avoid the use of special characters and any form of encryption. Be sure to include the docket number, EC-2000-003 on your document. In person, deliver comments to Enforcement and Compliance Docket and Information Center, U.S. Environmental Protection Agency, Ariel Rios Building, room 4033, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20004.

Public Hearings: EPA will hold public hearings on this proposed rule at the following addresses [insert addresses-city, address, room]:
1.
2.
3.
4.

Docket. Docket No. EC-2000-003 contains information relevant to the proposed rule. You can read and copy it between 8 a.m. and 4 p.m., Monday though Friday (except

for Federal holidays), at Ariel Rios Building 1200 Pennsylvania Avenue, NW, Washington, D.C., 20004; telephone (202)564-2614 or (202)564-5119. Go to Room 4033. The docket office may charge a reasonable fee for copying.

The docket is an organized file of all the information EPA considered in developing this proposed rule. The docketing system allows you to readily identify and locate documents so you can participate in the rulemaking. Along with the proposed and promulgated standards and their preambles, contents of the docket will serve as the record in case of judicial review.

FOR FURTHER INFORMATION CONTACT: Mark Gordon, Attorney Advisor at (202)260-8886, or David Sutton, Deputy Director at (202)564-4444, OSDBU, U.S. Environmental Protection Agency, Ariel Rios Building 1200 Pennsylvania Avenue N.W., Washington, D.C. 20004.

SUPPLEMENTARY INFORMATION: This is a proposed rule. The contents of today's preamble are listed in the following outline:

F. Unfunded Mandates Reform Act
G. Protection of children from Environmental Health Risks and Safety Risks under Executive Order 13045
H. National Technology Transfer and Advancement Act

I. Introduction–What is the Background of this Rulemaking Proposal?

40 CFR Part 33, Procurement under Assistance Agreements, became effective March 28, 1983. These procurement requirements required recipients of EPA financial assistance agreements to take the six affirmative steps to assure that small, minority and women's businesses were used when possible as sources of construction, services and supplies. As part of a government-wide effort in 1988, EPA promulgated 40 CFR Part 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. In 1996, the Agency promulgated 40 CFR Part 30, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. Parts 30 and 31 superseded the procurement provisions of former Part 33. Parts 30 and 31 contain DBE Program provisions at 40 CFR §30.44(b) and §31.36(e), respectively.

Various EPA programs have their own regulations containing DBE requirements. For example, the EPA Superfund Program promulgated regulations which contain DBE provisions for Grants for Technical Assistance at 40 CFR §35.4066(g) and for Cooperative Agreements and Superfund State Contracts for Superfund Response Actions at 40 CFR §35.6015(a)(26) and (54), §35.6580 and §35.6665 (b). The EPA Clean Water State Revolving Fund (CWSRF) program promulgated regulations containing DBE provisions at 40 CFR §35.3145(d) and (e). The DBE requirements under CWSRF program have been applied in the same manner in the Drinking Water State Revolving Fund (DWSRF) program. DBE requirements for Research and Demonstration Grants can be found at 40 CFR §40.145-3(c).

EPA's legal authorities for its DBE Program are:

Public Law 102-389, a 1993 appropriations act (42 U.S.C. §4370d) (EPA's 8% statute), which provides:

"The Administrator of the Environmental Protection Agency shall, hereafter, to the fullest extent possible, ensure that at least 8 per centum of Federal funding for prime and subcontracts awarded in support of authorized programs, including grants, loans and contracts for wastewater treatment and leaking underground storage tanks grants, be made available to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (within the meaning of Section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. §637(a)(5) and (6)), including historically black colleges and universities. For purpose of this section, economically and socially disadvantaged individuals shall be deemed to include women..."

Public Law 101-549, Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. §7601 note) (EPA's 10% statute), which states:

"In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments which use funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of the total Federal funding for such research will be made available to disadvantaged business concerns."

Other legal authorities include Public Law 99-499, the Superfund Amendments and Reauthorization Act of 1986; Public Law 100-590, the Small Business Administration Reauthorization and Amendment Act of 1988; Executive Order 12138, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating and Implementing a National Program for Women's Business Enterprise," issued May 18, 1979; Executive Order 11625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," issued October 13, 1971; and Executive Order 12432, "Minority Business Enterprise Development," issued July 14, 1983.

In 1995, the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097(1995), extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. In other words, such programs must be based on a compelling governmental interest, for example, remedying the effects of discrimination, and must be narrowly tailored to

accomplish that interest.

In 1996, the Department of Justice (DOJ) began a review of affirmative action programs in the Federal Government. In response to this review, the Department of Transportation (DOT) revised its program for participation of DBEs in procurement under DOT's financial assistance agreements. 64 FR 5096. In direct Federal procurement, the Small Business Administration (SBA) has issued final regulations amending two programs intended to foster small disadvantaged business participation, the 8(a) Business Development and Small Disadvantaged Business Participation Programs. 63 FR 35726; 63 FR 36120.

This proposed rulemaking would affect only procurements pursuant to EPA financial assistance agreements rather than direct Federal procurement actions. All of EPA's current DBE fair share goals and good faith efforts regulatory provisions would be deleted as part of this rulemaking effort, and the proposed DBE provisions to be codified in the new 40 CFR Part 33 would apply. In addition, this proposal would supersede inconsistent provisions of previous guidance documents for EPA's former MBE and WBE Program, including, but not limited to, OSDBU's "Guidance for Utilization of Small, Minority, and Women's Business Enterprises in Procurement Under Assistance Agreements" (the 1997 Guidance). 62 FR 45645.

II. Section-by-Section Analysis

Subpart A - General Provisions

§33.101 What are the objectives of this Part?

This proposed rule is EPA's revision to its current MBE and WBE Program. EPA needs to reconcile its requirements for financial assistance agreements under EPA's 8% statute and EPA's 10% statute with the Supreme Court's decision in Adarand. In that case the Supreme Court held that Federal Government race/ethnicity based affirmative action programs are subject to strict judicial scrutiny. Federal affirmative action programs must be based on a compelling government interest, for example, remedying the effects of racial/ethnic discrimination, and must be narrowly

tailored to accomplish that interest.

EPA's proposed rulemaking is one part of the Clinton Administration's overall effort to revise affirmative action programs in light of Adarand. This rulemaking proposal is EPA's primary vehicle for "mending" the details of EPA's DBE Program by tailoring program implementation more precisely to the objective of remedying the effects of racial/ethnic discrimination.

§33.102 When do the requirements of this Part apply?

This Part's requirements apply to procurement under EPA financial assistance agreements, including financial assistance agreements to capitalize revolving loan funds, performed entirely within the United States, its territories or possessions.

§33.103 What do the terms in this Part mean?

To the extent possible, EPA has referred to definitions contained in 40 CFR Parts 30, 31 and 35, and other agencies' existing regulations, e.g., Historically Black College or University (HBCU). Other definitions were derived from the 1997 Guidance.

EPA is creating a new term, DBE, for its revised program. The new Part 33 defines DBE as an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes, as well as a Small Business Enterprise (SBE), a Labor Surplus Area Firm (LSAF) or a Small Business in a Rural Area (SBRA). Unlike EPA's previous program, the terms MBE and WBE no longer describe the entire program. Instead, these terms are now merely subsets of the entities described as DBEs. As a result, the definition of MBE has been modified to include an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes.

In addition, the term "financial assistance agreement" has been defined as both grants and cooperative agreements awarded by EPA, including such agreements used to capitalize revolving loan funds including, but not limited to, the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund or the Brownfields

Revolving Fund programs. The term "identified loan" is also defined to specify for recipients of such capitalization grants to which projects the requirements of this Part apply. For CWSRF and DWSRF capitalization grant recipients, the identified loans will be specified in their Intended Use Plan. For Brownfields capitalization grant recipients, the identified loans will be those funded with Federal financial assistance.

The definition of Small Business in Rural Areas has been shortened from the one contained in the 1997 Guidance. No substantive change is intended. The U.S. Department of Agriculture (USDA) Rural-Urban Continuum Classification Code applies to every county in the United States, and classifies counties based on proximity to metropolitan areas. EPA is using Codes 6-9 as rural counties for purposes of identifying small businesses in rural areas.

§33.104 May a recipient apply for a waiver from the requirements of this Part?

A recipient will be able to apply for a waiver in a special or exceptional situation where the recipient believes that compliance with the requirements of this Rule would be impractical. The Agency believes that the waiver provision is an important component of narrowly tailoring its DBE Program to unique local circumstances and to ensure non-discrimination. EPA intends to carefully review any waiver applications to ensure that any proposed alternative program is able to meet the objectives of EPA's DBE Program and is in accordance with law. This added flexibility could allow an EPA financial assistance agreement recipient to deal creatively with its specific circumstances.

§33.105 What are the compliance and enforcement provisions of this Part?

This section reserves to EPA the right to take remedial action under existing legal authorities if a recipient fails to comply with any of the requirements of the Rule.

§33.106 What assurances must contractors make?

A recipients must ensure that the contract term and condition in the Appendix to this Rule is included in the procurement contracts it awards under EPA financial

assistance agreements. This includes contracts under identified loans pursuant to EPA financial assistance agreements capitalizing revolving loan fund programs. This term and condition ensures that a recipient applies pertinent provisions of this Rule to its prime contractor.

Subpart B–Certification

§33.201 What does this Subpart require?

Currently EPA recognizes an entity which is certified as socially and economically disadvantaged by the Small Business Administration (SBA), certified as an MBE by a State or Federal Agency or self-certifies that it is an independent business concern owned and controlled by a minority group member(s) as an MBE. 40 CFR 35.6015 (26); the 1997 Guidance, pp. 3-2 through 3-6.

EPA is proposing to make three changes to the current certification requirements in order to satisfy Adarand's strict scrutiny analysis. The first change is to no longer allow an entity to self-certify as owned and/or controlled by a socially and economically disadvantaged individual under EPA's 8% or 10% statutes. The second change is to allow recognition of certifications of entities as owned and/or controlled by a socially and economically disadvantaged individual under EPA's 8% or 10% statutes by State, local and Indian Tribal Governments and private certifiers so long as their criteria match those under Section 8(a)(5) and (6) of the Small Business Act and SBA's 8(a) Business Development Program regulations. The third change is to clarify that EPA will accept DOT DBE certifications as valid certifications under this program.

The provisions for certification under EPA's 8% and 10% statutes have been separated from one another since the presumptions under those statutes are different. Because EPA's 8% statute incorporates Section 8(a)(5) of the Small Business Act, this Rule adopts for purposes of the 8% statute SBA's regulatory presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong and

Macao), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Phillippines, U.S. Trust Territory of the Pacific Islands, (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA. In addition, HBCUs and women automatically qualify as socially and economically disadvantaged under EPA's 8% statute.

EPA's 10% statute also adopts SBA's regulatory presumption regarding the socially disadvantaged status of the individuals listed above. However, EPA's 10% statute also presumes that Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are socially and economically disadvantaged individuals. Furthermore, EPA's 10% statute presumes the following institutions are entities owned and controlled by socially and economically disadvantaged individuals: HBCUs, colleges and universities having a student body in which 40% of the students are Hispanic, Minority Institutions and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

EPA's 8% and 10% statutes may be distinguished by their provisions regarding ownership and control. EPA's 8% statute references entities owned or controlled by socially and economically disadvantaged individuals while EPA's 10% statute references entities owned and controlled by socially and economically disadvantaged individuals.

§33.202 How does an entity become certified under EPA's 8% statute?

An entity must establish that it is owned or controlled by socially and economically disadvantaged individuals. Definitions of "ownership," "control" and "socially and economically disadvantaged individuals" are the same as under the Small Business Act and its implementing regulations at 13 CFR §124.105, §124.106, §124.103 and §124.104. Generally, these regulations provide that ownership must be real, substantial and continuing, going beyond pro forma ownership of the business

concern as reflected in ownership documents. Owners must share in the risks and profits of the business concern commensurate with their ownership interests. Control is demonstrated in most cases by the power to direct or cause the direction of the management and policies of the business concern and to make day-to-day as well as long-term decisions on matters of management, policy and operations. One aspect of the SBA regulations regarding economic disadvantage worth noting is the exclusion of individuals with a net worth greater than or equal to $250,000 from initial eligibility and individuals with a net worth greater than or equal to $750,000 from continued eligibility.

HBCUs do not need to go through the certification process contained in Subpart B of this Rule since EPA's 8% statute automatically deems an HBCU to be owned or controlled by socially and economically disadvantaged individuals. While women are also automatically deemed to be socially and economically disadvantaged under EPA's 8% statute, entities must still evidence ownership or control in accordance with subparagraph (a) of this section, which may be accomplished by self-certification, pursuant to §33.204(b).

§33.203 How does an entity become certified under EPA's 10% statute?

An entity must establish that it is owned and controlled by socially and economically disadvantaged individuals. Definitions of "ownership," "control" and "socially and economically disadvantaged individuals" are the same as under the Small Business Act and its implementing regulations at 13 CFR §124.105, §124.106, §124.103 and §124.104.

The provisions contained within subparagraphs (d)-(g) of this section are derived from EPA's 10% statute.

§33.204 Where does an entity become certified under EPA's 8% and 10% statutes?

This proposed rule discontinues acceptance of an individual's self-certification regarding his or her racial/ethnic status in order to ensure consistency with the approach taken by the entire Federal Government in light of Adarand. For example, SBA under its Small Disadvantaged Business Program no longer permits self-certification of social

and economic disadvantaged status. Similarly, DOT does not allow self-certification under its DBE Program . EPA is not proposing to institute its own certification process under this Rule. Instead, EPA will accept current certifications by the SBA and DOT under their respective programs. In addition, EPA will accept certifications by State, local or Indian Tribal Governments and private certifiers as an attempt to ease the burden created by discontinuation of the self-certification option.

Women may continue to self-certify under EPA's 8% and 10% statutes, since Adarand affects only racial or ethnic decision-making criteria of a Federal program.

EPA especially welcomes public comment on these proposed changes, especially from large businesses and members of the DBE community since they are most likely to be directly affected if these proposed changes become part of the final rule.

§33.205 What conduct is prohibited by this Subpart?

This provision prohibits false, fraudulent or deceitful conduct on the part of entities attempting to participate in the DBE Program. It has been placed in the Rule in order to protect the integrity of the DBE Program.

Subpart C–Good Faith Efforts

§33.301 What does this Subpart require?

The good faith efforts required by this Section are activities by a recipient or its prime contractor to increase DBE awareness of procurement opportunities through race/gender neutral efforts. Race/gender neutral efforts are ones which increase contracting opportunities in general, including outreach, recruitment and technical assistance. The good faith efforts must be made by a recipient and its prime contractor toward all DBEs, including SBEs, LSAFs and SBRAs and not just MBEs and WBEs, even if the fair share goal requirements of Subpart D have been met.

For purposes of simplification, EPA has combined the six positive efforts of 40 CFR §30.44(b) applicable to institutions of higher education, hospitals and other non-

profit organizations with the six affirmative steps of 40 CFR §31.36(e) applicable to State, local and Indian Tribal Government recipients. It is not the intention of the Agency to change the substance of the positive efforts or the affirmative steps.

The six good faith efforts required by this Section must be performed by all recipients and their prime contractors, if they award subcontracts. EPA offers the following examples to assist recipients and prime contractors in carrying out the good faith efforts.

(1) Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For State, local and Indian Tribal Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.

(a) Maintain and update a listing of qualified DBEs that can be solicited for construction, equipment, services and/or supplies.

(b) Provide listings to all interested parties who request copies of the bidding or proposing documents.

(c) Contact appropriate sources within your geographic area and State to identify qualified DBEs for placement on your DBE business listings.

(d) Utilize other DBE listings such as those of the State's Minority Business Office, the Small Business Administration, Minority Business Development Agency (MBDA) of the Department of Commerce, EPA OSDBU, and DOT.

(e) Have State environmental agency personnel review solicitation lists.

(2) Make information of forthcoming opportunities available to DBEs and arrange time frames for contracts and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process.

(a) Consider lead times and scheduling requirements often needed for DBE participation.

(b) Develop realistic delivery schedules which may provide for greater DBE participation.

(c) Advertise through the minority media in order to facilitate DBE utilization. Such advertisements may include, but are not limited to, contracting and subcontracting opportunities, hiring and employment, or any other matter related to the project.

(d) Advertise in general circulation publications, trade publications, State agency publications and minority and women's business focused media concerning contracting opportunities on your projects. Maintain a list of minority and/or women's business-focused publications that may be utilized to solicit DBEs.

(3) Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For State, local and Indian Tribal Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.

(a) Perform an analysis to identify portions of work that can be divided and performed by qualified DBEs.

(b) Scrutinize the elements of the total project to develop economical units of work that are within the bonding range of DBEs.

(c) Conduct meetings, conferences, and follow-ups with DBE associations and minority media to inform these groups of opportunities to provide construction, equipment, services and supplies.

(4) Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.

(a) Notify DBEs of future procurement opportunities so they may establish bidding solicitations and procurement plans.

(b) Provide DBE trade organizations with succinct summaries of solicitations.

(c) Provide interested DBEs with adequate information about plans, specifications, timing and other requirements of the proposed projects.

(5) Use the services and assistance of the SBA and the MBDA.

(a) Use the services of outreach programs sponsored by the MBDA and/or the SBA to recruit bona fide firms for placement on DBE bidders lists to assist these firms in the development of bid packaging.

(b) Seek out Minority Business Development Centers (MBDCs) to assist recipients and prime contractors in identifying DBEs for potential work opportunities on your projects.

(6) If the prime contractor awards subcontracts, require the prime contractor to take the steps in subparagraphs (1)-(5) of this section.

(a) Analyze bid packages for compliance with the good faith efforts.

(b) Provide bidders and offerors with listings of qualified DBEs, and inform them of the good faith efforts required.

(c) Conduct pre-bid, pre-solicitation, and post-award conferences to ensure that consultants, suppliers, and builders solicit DBEs.

What constitutes an appropriate use of the services and assistance of the SBA and

the MBDA depends on the circumstances. It may involve using the services of outreach programs sponsored by the MBDA and/or the SBA to recruit bona fide firms for placement on DBE bidder's lists to assist the firms in the development of bid packages. Recipients and prime contractors may use SBA's Pro-Net Procurement Marketing and Access Network services to identify available DBEs to do the work. Recipients and prime contractors may utilize MBDCs for assistance in identifying DBEs for potential work opportunities on contracts under EPA financial assistance agreements, as well as using MBDA's Phoenix dBASE System to identify available DBEs to do the work.

§33.302 Are there special rules for loans under financial assistance agreements?

A recipient of a financial assistance agreement to capitalize a revolving loan fund, such as a State under the CWSRF or DWSRF, or the Brownfields program, must require entities receiving identified loans to comply with the good faith efforts described in §33.301.

§33.303 Are there any additional contract administration requirements?

The provisions of this Section are intended to prevent any "bait and switch" tactics by prime contractors which may circumvent the spirit of the DBE program. This proposal would require a recipient to approve in writing before its prime contractor could terminate a DBE subcontractor for convenience and then perform the work itself.

In addition, when a DBE subcontractor is terminated or fails to complete its work under the subcontract for any reason, the recipient must require the prime contractor to make good faith efforts in hiring another subcontractor.

Finally, a recipient must require its prime contractor to continue to make the good faith efforts even if the fair share goals in Subpart D of this Rule have been met.

Subpart D–Fair Share Goals

§33.401 What does this Subpart require?

EPA's previous fair share policy has required that fair share goals for MBEs and WBEs be negotiated with EPA financial assistance recipients, but has not required that fair share goals be established for other types of DBEs. While good faith efforts have been required with respect to all DBEs, the numerical fair share goals have been negotiated only for MBEs and WBEs. This proposed rule would continue this policy.

EPA's position reflects the requirement of its 8% and 10% statutes and is consistent with Executive Order 12138 (May 18, 1979), which requires all Federal agencies to take "appropriate affirmative action in support of [WBEs]." Further, OMB Circular A-102 (March 3, 1988) provides that "[i]t is national policy to award a fair share of contracts to small and minority business firms: and that "[g]rantees shall take similar appropriate affirmative action... [in] support of women's enterprises..."

Prior to FY 1998, EPA applied its 8% and 10% MBE and WBE goals directly to each of its financial assistance agreements. Thus, each EPA financial assistance agreement for research relating to the requirements of the Clean Air Act Amendments of 1990 had a minimum of 10% as MBE and WBE fair share goals. All other EPA financial assistance agreements had a minimum of 8% as MBE and WBE fair share goals. EPA changed this policy beginning with its FY 1998 financial assistance agreements so that the minimum 8% and 10% MBE and WBE fair share goals became agency-wide objectives rather than fair share goals for each EPA financial assistance agreement. Notwithstanding these national objectives, fair share goals for each financial assistance agreement recipient are negotiated based on an assessment of the availability of qualified MBEs and WBEs in the relevant procurement market for construction, equipment, services and supplies; thus, the overall national objectives may vary from specific fair share goals of an individual financial assistance agreement recipient.

The 8% and 10% goals are national objectives which EPA uses to evaluate and monitor MBE and WBE opportunities to participate in contracts under EPA financial assistance agreements. They do not serve as quotas or set-asides. These national objectives do not authorize or require a recipient to establish MBE or WBE fair share goals at the 8% or 10% levels, or to take any special administrative steps if its fair share goals are above or below 8% or 10%. The fair share goals apply only to procurement dollars and not, for example, to salaries or other overhead costs.

§33.402 Are there special rules for loans under EPA financial assistance agreements?

A recipient of an EPA financial assistance agreement to capitalize a revolving loan fund will apply its fair share goal (if the entity receiving the identified loan uses a relevant geographic area that is similar to the recipient's) or a separately negotiated fair share goal to entities receiving identified loans. For the CWSRF and DWSRF programs, identified loans are those projects funded from amounts equal to the capitalization grant and identified as such in the recipient's Intended Use Plan. For the Brownfields Revolving Loan program, identified loans are those projects funded with federal financial assistance. If procurements will occur over more than one year, the recipient may choose to apply the fair share goal in place either for the year in which the identified loan is awarded or for the year in which the procurement action occurs. The recipient must specify this choice in the financial assistance agreement, or incorporate it by reference therein.

§33.403 What is a fair share goal?

A fair share goal is a percentage based on the availability of qualified MBEs, and WBEs in the relevant geographic market for the procurement categories of construction, equipment, services and supplies compared to the number of all qualified entities in the same market for the same procurement categories adjusted to reflect the level of MBE and WBE participation absent the effects of discrimination.

A fair share goal is not a quota. A recipient and its prime contractor must make the good faith efforts described in Subpart C of this Rule in attempting to achieve its fair share goals.

§33.404 When must a recipient negotiate fair share goals with EPA?

This Rule requires a recipient to submit its proposed fair share goals and supporting documentation to the Agency within 90 days of its acceptance of the financial assistance agreement. In recent years EPA has included time frames for submission of proposed fair share goals in special grant conditions for each financial assistance agreement. EPA is now incorporating a general time frame into this Rule.

A recipient may not spend any of its financial assistance award for procurement until the fair share goal negotiation process has been completed.

§33.405 How does a recipient determine its fair share goals?

Starting in FY 1998, EPA, through the 1997 Guidance and implementing terms and conditions, has required that fair share goals for MBEs and WBEs be based on the availability of qualified MBEs and WBEs in the relevant market for the four procurement categories of construction, equipment, services and supplies. In this proposed regulation, EPA is also offering recipients the option of combining the four proposed procurement category goals for MBEs into a single weighted goal. The same option would be available for WBEs . In this proposed regulation, EPA is continuing to allow recipients to establish separate MBE and WBE fair share goals for different EPA financial assistance programs and to establish separate MBE and WBE fair share goals by geographic area.

Beginning with MBE and WBE goals for FY 1999, the Agency required that fair share negotiations be supported by an availability analysis, or at the recipient's option, a disparity study conducted within the past ten years. In this rulemaking, we are proposing to keep this basic approach, with some fine tuning. The recipient would have to consider whether an adjustment from the availability analysis or disparity study percentage is needed based on past MBE or WBE achievements, other disparity studies done within the recipient's jurisdiction or other types of relevant available data (e.g., statistical disparities in the ability of MBEs and WBEs to obtain financing, bonding and insurance required to participate in the DBE Program). This process is needed to ensure that goals accurately reflect the MBE and WBE participation expected absent the effects of discrimination.

Recognizing that EPA makes many different types of financial assistance awards (e.g., Superfund awards for Hazardous Waste Cleanup, CWSRF capitalization grants) to a wide variety of recipients, EPA is also soliciting comments to help us determine how best to achieve a "level playing field" for MBEs and WBEs. EPA is specifically asking for comments on whether recipients should be able to choose from a variety of methods in calculating MBE and WBE fair share goals with the Agency.

This proposal is designed to meet the constitutional requirement that EPA's DBE Program is narrowly tailored to remedy the effects of discrimination. This process is intended to provide maximum flexibility for recipients while ensuring that goals are based, at a minimum, on the availability of qualified MBEs and WBEs in the recipient's relevant market.

A recipient may negotiate separate MBE and WBE fair share goals applicable to different geographic markets, and must use the fair share goals for the geographic markets in which the contract work for its project is being performed.

(1) Step 1: Determining a Base Figure for the MBE and WBE goals

A recipient may determine a base figure by preparing an availability analysis. An availability analysis represents an actual measurement by the recipient of the availability of MBEs and WBEs in the relevant geographic market in the four procurement categories compared to the number of all businesses in the same market that perform work in the same procurement categories. From this data the recipient would derive a base figure that is as accurate a representation as possible of the percentage of qualified MBEs and WBEs available versus the total number of available businesses.

EPA is not specifying a methodology or formula for a recipient to use in preparing its availability analysis. Instead, the Agency is proposing to place primary emphasis on the principles underlying the measurement, requiring only that a measurement of the availability be made on the basis of demonstrable evidence of relevant market conditions.

EPA is providing a number of examples which recipients may adopt or use as guidelines for deriving their own availability analysis.

(A) MBE/WBE Directories and Census Bureau Data

The first example is setting an MBE base figure using a recipient's own MBE directories. For each procurement category, the recipient would first tabulate the

number of qualified MBEs, with the resulting number becoming the numerator of the base figure. The denominator could then be derived from the Census Bureau's County Business Pattern (CBP) Database. The CBP Database contains all available businesses in the recipient's relevant geographic market organized by Standard Industrial Code (SIC code). The recipient may then combine all available businesses pertaining to construction, for example, and use this number as the denominator in the base figure for that particular procurement category.

EPA has a link to the Census Bureau's website at osdbuweb.dot.gov/business/dbe/abe.pdf. Utilizing this data, recipients would be able to customize their base figure within each procurement category. For example, major construction SIC codes are 15, 16 and 17. If a recipient estimates it will spend 10% of its federal funds within SIC code 15, 40% in SIC code 16, 25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 35 (equipment) and 87 (services), the recipient could separately determine the availability of MBEs for each of the SIC codes and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of MBEs in its directory for each of the SIC codes, then extracting the availability of CBP businesses for the same SIC codes. The recipient would then perform the following calculation to arrive at a base figure for step one of the goal setting process for MBEs.

$$\text{Numerator} = [10(\text{MBEs in SIC code 15}) + 40(\text{MBEs in SIC code 16}) + 25(\text{MBEs in SIC code 17}) + 25(\text{MBEs in SIC codes 35 \& 87})] \times 100$$

$$\text{Denominator} = \text{CBPs in SIC code 15} + \text{CBPs in SIC code 16} + \text{CBPs in SIC code 17} + \text{CBPs in SIC codes 35 \& 87}$$

$$\text{Base Figure} = \frac{\text{Numerator}}{\text{Denominator}}$$

This formula is offered only as an example of how a recipient could choose to use the CBP Database. Recipients using the CBP data could choose whether to weight their

calculation, and whether to do so by individual SIC codes or by groups of SIC codes, based on their own assessment of which method will best fit their spending patterns.

EPA is proposing to allow a recipient to negotiate separate MBE and separate WBE fair share goals for each of the four procurement categories of construction, equipment, services and supplies or, at its option, negotiate a combined weighted goal for these four procurement category goals for MBEs and WBEs. This proposed approach would give recipients flexibility in preparing their availability analyses.

Several issues arise when comparing numbers from two different data sources. First, recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. A recipient using its own MBE and WBE directories will still need to determine a similar scope for the fields it will use for the denominator. A good way for a recipient to do this would be to examine its contracting program and determine the SIC codes for the majority of its contracts. While it may be sufficient for some recipients to use their State borders as the boundaries for their relevant geographic market, this may not be appropriate for other recipients whose relevant geographic market may extend beyond their State borders. Conversely, the relevant geographic market for some recipients may be a specific region within a State's borders.

An alternative means of calculating the numerator is to use a bidders list. Under this approach the recipient would measure availability by the number of firms that have previously competed in the recipient's procurement process. The recipient must include all firms that have competed for prime and/or subcontracts. In the category of construction, most MBE and WBE participation occurs through subcontracting. It is therefore crucial that all firms competing for subcontracts be included in the bidders list. EPA encourages recipients to use any sources of local data which allows them to make a more accurate calculation.

(B) Data from a Disparity Study

Another option for a recipient in determining a base figure is using a disparity study. Disparity studies involve comparing available MBE and WBE contractors with

the contracts actually awarded to them. They generally are based on statistics which measure MBE and WBE utilization and anecdotal evidence showing that the underutilization of MBEs and WBEs is caused by conditions other than chance. These studies may be expensive and time consuming to perform. In general, State and local Governments have conducted disparity studies in an attempt to meet the strict scrutiny requirements for race-based affirmative action programs imposed by the Supreme Court in Richmond v. J. A. Croson, 109 S. Ct. 706 (1989).

EPA is not requiring a recipient to conduct a disparity study. EPA is also not specifying the data or analysis required in a disparity study since the design and conduct of the study are best left to recipients and the professional organizations with which they contract to perform the studies. If a disparity study is used it must address MBE and WBE utilization under the four procurement categories and be no more than ten years old.

(C) The Goal of Another EPA Recipient

A recipient may also use another EPA recipient's MBE and WBE goals if they were established in accordance with this Rule and were based on a substantially similar relevant geographic market. For example, a non-State agency recipient may use a State agency's MBE and WBE fair share goals, but only if the non-State agency uses a substantially similar geographic market. Otherwise, the non-State Agency recipient would have to negotiate its own MBE and WBE fair share goals with EPA based on the availability of MBEs and WBEs in its relevant geographic market. With the proposed exemption from the fair share goal negotiation process, the number of recipients who would be required to separately negotiate with EPA would be substantially reduced.

(D) Alternative Methods

This proposal also includes an option for recipients to propose an alternative method for calculating MBE and WBE base figures. Recipients may use this option to take advantage of any unique expertise or source of data that may not be available to other recipients, such as a comparable goal negotiated with DOT. EPA will consider any such proposal that recipients believe will better reflect their relevant market than any of the examples provided in this Rule.

Step 2: Adjusting the Base Figure for the MBE and WBE Goals

Once a recipient has derived base figures for its proposed MBE and WBE goals, it must then consider whether an adjustment from the Step 1 MBE and WBE base figures is appropriate. This second step is needed to ensure that goals more accurately reflect the MBE and WBE participation expected absent the effects of discrimination. A recipient should consider the proven capacity of MBEs and WBEs to perform on contracts under EPA financial assistance agreements. MBE and WBE past utilization does not necessarily reflect the availability of MBEs and WBEs. However, such past utilization is an indicia of the proven capacity of an MBE or WBE to perform on contracts under EPA financial assistance agreements. Other relevant information which should be examined, if available, include any other disparity studies conducted within a recipient's relevant geographic market; statistical disparities in the ability of MBEs and WBEs to get necessary financing, bonding and insurance; and data on limitations for employment, self employment, education, training and union apprenticeship.

EPA is not proposing to require recipients to make an adjustment to their base figures. Rather, recipients must consider whether an adjustment to the base figures is appropriate, and if so, make the adjustment. It is important to note that the data recipients would consider under this proposed approach only involves existing data and not the generation of any new data.

The question of allowability of costs of preparing availability analyses or disparity studies in connection with the DBE program is determined in accordance with the cost principles applicable to the organization incurring the cost. 40 CFR §30.27, §31.22. For State and local governments, the pertinent cost principles are found in OMB Circular A-87, as amended 8/29/97 ("A-87"). For institutions of higher education and other non-profit institutions, OMB Circulars A-21 and A-122 apply, respectively. Allowability of costs for hospitals is determined in accordance with the provision of appendix E of 45 CFR Part 74.

In general, the cost must be necessary and reasonable, be allocable to the Federal grant, be consistent with State law and be afforded consistent treatment as direct or indirect. The cost must adequately documented, and be the net of any applicable credits. There is nothing inherent in the cost principles that would render the DBE costs

unallowable.

Each recipient will have different fact situations to apply. In CERCLA Core Program Cooperative Agreements, costs incurred in encouraging DBE utilization in the Superfund program are allowable for funding. The recipient may have conducted an analysis or study for its own purposes prior to the EPA financial assistance agreement, in which case some of the costs might be allocable to the EPA grant as an in-kind contribution. Costs must also be treated consistently as either direct or indirect in similar circumstances. Under OMB cost principles the costs of such analyses or studies could either be allowable direct or allowable indirect costs under an EPA assistance award. The recipient must determine whether under its particular circumstances, the DBE costs are allocable to the cost objective in question, and whether it is a direct or indirect cost.

In each case, the recipient will have to devise a method of allocating the cost of the analysis or study appropriately. If audited, the recipient may be asked to document and justify the allocation. If a recipient has questions concerning allocation issues, it should contact its appropriate EPA grants administration office.

§33.406 May a recipient designate a lead agency for fair share goal negotiation purposes?

When a recipient has more than one State Agency recipient, those State Agencies may, if they wish, designate a lead agency to negotiate one set of MBE and one set of WBE fair share goals with EPA which could be used by all the agencies in that State. Otherwise, each State Agency must negotiate its own fair share goals with EPA.

§33.407 How long do MBE and WBE fair share goals remain in effect?

Once approved, a recipient's MBE and WBE fair share goals would remain in effect for three fiscal years. However, if significant changes have occurred rendering the data relied upon in establishing the fair share goals obsolete, the recipient and EPA will renegotiate the fair share goals before the end of the three fiscal year period.

§33.408 May a recipient use quotas as part of this program?

A recipient may not use quotas in procurement under EPA financial assistance agreements. EPA's 10% statute specifically prohibits such action.

§33.409 May a recipient use race and/or gender conscious measures as part of this program?

To the extent good faith efforts described in Subpart C of this Rule and other race and/or gender neutral efforts prove to be inadequate to achieve fair share goals for MBEs and WBEs, a recipient or prime contractor is encouraged to take reasonable race and/or gender conscious action to the extent necessary to more closely achieve the fair share goals. Such actions may include, among other things, price incentives and technical evaluation credits. Any use of race and/or gender conscious measures must not result in the selection of an unqualified MBE or WBE. A recipient must notify EPA in advance of any race and/or gender conscious action it plans to take.

§33.410 May a recipient be penalized for failing to meet its fair share goals?

Under this Rule, a recipient may not be penalized or considered to be in noncompliance solely because its MBE or WBE utilization falls short of its fair share goals. However, EPA may take remedial action under §33.105 for a recipient's failure to administer the DBE Program in accordance with the good faith effort requirements described in Subpart C.

§33.411 Who may be exempted from this Subpart?

(a) General

EPA is proposing to exempt recipients of financial assistance agreements totaling $100,000 or less in EPA funds for any particular EPA financial assistance project or in any one fiscal year from the fair share negotiations requirement. This exemption is designed to minimize administrative burdens on these recipients. Financial assistance agreements of $100,000 or less account for about 50% of new EPA financial assistance awards each fiscal year, but less than 5% of the total EPA financial assistance funds awarded.

(b) CWSRF and DWSRF

EPA is also proposing three alternative exemptions for the Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) Programs. The CWSRF and DWSRF programs are different from other assistance programs at EPA. Unlike typical grant programs, where EPA makes direct grants for discrete projects and activities, in the SRF programs EPA makes grants to capitalize each State's Revolving Fund (SRF). The SRF also receives an amount of State funds equal to 20% of the capitalization grant, any proceeds from bonds issued by the State, repayments of principal and interest, and interest earnings of the fund. From this fund, the State makes loans to recipients for eligible projects. These projects range in scope from multi-million dollar wastewater treatment works for municipalities, to small non-point source pollution prevention projects on farms. In the DWSRF program particularly, many public water systems receive relatively small loans. The SRF may also be used for security for bonds issued to leverage the amounts in the SRF, or for guarantees or refinancing of eligible projects.

In both the CWSRF and DWSRF programs, EPA's grantee–the State–uses very little of the grant amount for procurement. The loan recipients conduct most of the procurement in building their projects. While EPA is responsible for the oversight of each State's compliance with EPA requirements, the State bears the responsibility for oversight of the procurement process.

Since it is difficult, if not impossible, to trace each dollar from these various sources once deposited in the fund, it is not practicable to attempt to identify which projects receive federal funds for the purpose of applying Federal requirements. Consequently, EPA regulations and guidance apply the current MBE/WBE requirements to conduct good faith efforts in procurement to identified loans, i.e., those projects identified on the State's Intended Use Plan with cumulative funding equal to the amount of the CWSRF or DWSRF capitalization grants, respectively.

In this proposed rule, EPA is imposing the responsibility on recipients of CWSRF or DWSRF financial assistance agreements to ensure that the fair share goals requirements of Subpart D are applied to identified loans as well. The recipient may apply its own fair share goal to any identified loans that is using a substantially similar relevant geographic market. If the entity receiving an identified loan does not use a substantially similar relevant geographic market, the recipient would have to apply MBE and WBE goals that are based on the availability of MBEs/WBEs in the particular

relevant geographic market to be used in procurement for the identified loan.

Because this change adds administrative requirements that could impair participation by certain entities in the programs, especially for small loans, EPA is considering whether or not an exemption for the two programs is appropriate. The exemption suggestions ranged from $250,000, which was the exemption level utilized by DOT, to loans of $100,000, the same level of exemption proposed for all grant recipients. Even at the $250,000 exemption level the percentage of total SRF loan funds exempted from these requirements would be expected to be small, because of the high average level of SRF funding. EPA invites comments on the alternatives in this proposal.

The first alternative is to apply the general $100,000 project amount exemption in §33.411 (a) from negotiating the fair share objective to SRF identified loans. For identified SRF loans under $100,000, recipients would still be required to apply the good faith efforts and to report their utilization in accordance with Subpart E of this Rule. For identified loans over $100,000, recipients would still be required to apply fair share goals in accordance with this Rule.

The second alternative is to exempt identified loan projects with an estimated cost of $250,000 from the requirement to apply a fair share objective. The entities receiving these loans would still have to make the good faith efforts to utilize DBEs in Subpart C of this Rule. and would be required to report in accordance with Subpart E of this Rule. For projects over $250,000, recipient would be required to apply fair share goals in accordance with this Rule.

The third alternative would be to exempt projects under $250,000 in amount, from all requirements under this Rule except for the Recordkeeping and Reporting requirements of Subpart E. For identified projects under $250,000, recipients would not apply the requirements regarding good faith efforts or the fair share goals, pursuant to Subparts C and D of this Rule.

If substantial impairment of an Agency program would result from its imposition, EPA may tailor the application of the DBE program requirements to maintain programmatic effectiveness. The Agency would still have to balance these concerns with its need to ensure that MBEs and WBEs have a full opportunity to compete

effectively in all procurement under EPA financial assistance agreement, which was Congress' intent when it enacted EPA's 8% statute. EPA is soliciting comments from all interested stakeholders on costs of compliance and administrative burdens in these programs and whether a special exemption is necessary.

§33.412 Is there a special rule for an Insular Area or Indian Tribal Government recipient?

Currently, Insular Area and Indian Tribal Government recipients are not required to negotiate fair share goals with EPA. In this Rule, EPA is proposes to treat Insular Area and Indian Tribal Government recipients the same as other recipients with regard to the fair share goal negotiation requirements. For example, the fair share goals of another recipient may be used so long as the relevant geographic market is the same or substantially similar.

The impact of this change on Insular Area and Indian Tribal Government recipients would be minimized by the exemption described in §33.411(a), if adopted. As with other recipients, fair share goals would remain in effect for three years.

EPA is proposing to phase-in the MBE and WBE fair share goal negotiation process for Insular Area and Indian Tribal Government recipients over three years in order for such recipients to adjust to this change in policy. In the interim, such recipients must still comply with all other requirements of this Rule.

The Indian Self-Determination Act, as amended, 25 U.S.C. 450(e)(b) (2), establishes the authority to require Indian organizations awarded federal contracts or grants to adhere to Indian preference in awarding subcontracts or subgrants. This proposed rule, if enacted, is not intended to supercede the provisions of the Indian Self-Determination Act.

Subpart E–Recordkeeping and Reporting

§33.501 What are the recordkeeping requirements of this Part?

A recipient is required to maintain the records documenting its compliance with the requirements of this Part, including documentation of its, and its prime contractor's

good faith efforts and data relied upon in formulating its fair share goals. A recipient must also comply with the applicable retention and access requirements for its financial assistance agreement, e.g., 40 CFR §30.53 (for institutions of higher education, hospitals and other non-profit organizations); 40 CFR §31.42 (for State, local and Indian Tribal Government recipients); and 40 CFR §35.6705, §35.6710 (for Superfund Response Action Cooperative Agreements).

§33.502 What are the reporting requirements of this Part?

The effectiveness of EPA's DBE Program may be measured through its reporting requirements. These reports measure EPA's progress in achieving the national goals established by EPA's 8% and 10% statutes.

All financial assistance agreement recipients must report on a quarterly basis except States (including Insular Areas), local and Indian Tribal Governments receiving Continuing Environmental Program grants, and institutions of higher education, hospitals and other non-profit organizations receiving financial assistance awards under 40 CFR Part 30, who report on an annual basis. Examples of continuing environmental program grants include those specified in 40 CFR Part 35, Subpart A, as well as Performance Partnership Grants.

In the past, EPA has presumed that all financial assistance award funds to Indian Tribal Government and Insular Area recipients have benefitted MBEs. Accordingly, such recipients have not been required to report MBE utilization. In this proposed Subpart, Indian Tribal Government and Insular Area recipients are treated the same as other recipients with regard to recordkeeping and reporting requirements. Such recipients would therefore be required to retain records and report on actual MBE and WBE utilization.

§33.503 How does a recipient calculate MBE and WBE participation?

In this rulemaking proposal the Agency is proposing to codify the principles of Chapter 8 of its 1997 Guidance concerning how MBE and WBE participation is counted.

EPA requires that a recipient report the total amount of financial assistance spent

on procurement and the amount awarded to an MBE or WBE. For EPA assistance awards, except the CWSRF and DWSRF Revolving Funds, all project expenditures are deemed to include both the Federal Share and the recipient's required matching share. Therefore, except in the SRF programs, the amount of procurement in the assistance award as a whole, i.e., including any required cost share funds contributed by the recipient is reported. Negative reports are required, i.e., if a recipient does not make an MBE or WBE procurement award in a reporting period, the recipient must still file a Form 5700-52A.

By requiring recipients to report, EPA is attempting to measure the amount of overall MBE and WBE participation under the DBE Program. The reporting of MBE and WBE dollar amounts under a particular prime contract will result in a total that is no more than 100% of the prime contract value. For example, if an MBE is awarded a prime contract and then subcontracts 30% of the value of the contract, the total number of dollars reported would remain at the 100% level. This would be true even if the subcontractor in this example is another MBE. In this proposal, EPA is deleting the provision from the 1997 Guidance regarding calculating the percentage participation of suppliers and haulers, in order to simplify the process.

If all project costs attributable to MBE and WBE participation are not eligible for funding under the EPA financial assistance agreement, the recipient may report MBE and WBE participation compared to the total eligible and non-eligible costs of the project.

Joint Ventures. The MBE and WBE participation within a joint venture shall be credited in a *pro rata* fashion. Where an MBE's or WBE's risk of loss, control or management responsibilities is not consistent with its share of the profit, the award official may direct an adjustment in the percentage of MBE or WBE participation.

Central Purchasing or Procurement Centers. Recipients must verify procurement dollars awarded to MBE and WBE firms from a recipient's central purchasing or procurement center.

In reporting MBE and WBE utilization, a recipient may use one of the methods described below or propose another method for approval by EPA.

(1) If records are maintained to do so, a recipient may report actual dollars expended on procurement from EPA financial assistance agreement funds to MBEs and WBEs;

(2) If records are maintained for a recipient's MBE and WBE procurement generally but records are not specifically maintained for procurement under EPA financial assistance agreements, a recipient's MBE and WBE percentage utilization for its funds as a whole may be applied proportionally to the amount of procurement under EPA financial assistance agreements; or

(3) If actual records of MBE and WBE utilization are not maintained, a recipient may authorize its procurement center to estimate the total amount of funds awarded to MBEs and WBEs. Such estimate, provided it is reasonable, will be accepted.

Brokers. MBE and WBE participation will be credited for those MBEs and WBEs performing a useful business function according to industry custom and practice. Recipients may not count expenditures to an MBE or WBE that acts merely as a broker or passive conduit in a transaction. A broker is a firm that does not itself perform, manage or supervise the work of its contract or subcontract in a manner consistent with the normal business practices for contractors or subcontractors in its line of business. However, an MBE or WBE may subcontract a portion of the work to a non-MBE or non-WBE, provided that such further subcontracting is in accordance with this proposed regulation and that the majority of work is retained by the MBE or WBE having the prime contract.

(1) **Presumption.** If an MBE or WBE prime contractor awards 50% or more of the prime contract value to a non-MBE and non-WBE, EPA presumes that such a MBE or WBE prime contractor is a broker. No MBE or WBE utilization may be reported for a broker.

(2) **Rebuttal.** An MBE or WBE contractor may rebut this presumption by demonstrating that the degree of subcontracting is consistent with normal business practice and that it will actively perform, manage and supervise the work under its contract.

III. Regulatory Analyses

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or programs, or the rights and obligations of recipients thereof.

(4) Raise more legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Based on currently available information about costs that may be associated with complying with this rule (e.g., costs of preparing an availability analysis, costs to obtain MBE certification), EPA has determined that this rule will not have an annual effect on the economy of $100 million or more. Therefore, EPA does not plan to prepare a regulatory impact statement for this rule. However, EPA invites commentors to furnish information on the economic costs, impacts and distributional effects of this draft rule, after which the agency may reconsider this determination.

B. Executive Order 13132 (Federalism):

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the

Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule does not have "federalism implications", as that phase is defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Because this rule conditions the use of federal assistance, it will not impose substantial direct compliance costs on State and local governments. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Stakeholders, including representative from State government agencies and State government organizations, were given an opportunity to comment on a draft of the rule which was posted on the Internet for public comment. A summary of the concerns raised during that consultation and EPA's response to those concerns will be provided in the preamble.

C. Consultation and Coordination with Indian Tribal Governments Under Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consuls with those government. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of

the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments " to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. This proposed rule would not result in expenditures, in the aggregate, of more than 1% of Indian tribal communities revenues in any one year. Nor are Indian tribal governments treated solely or qualitatively differently from other recipients, except for the three year phase - in period to comply with the fair share negotiations process to minimize any burden imposed on Tribes which would be subject to that requirement.

EPA will provide in a separate part of the preamble a discussion of our consultation with representatives of tribal governments and advise that copies of their communications to the agency will be available upon request.

It is important to note that neither of EPA's enabling statutes for our SBE/MBE/WBE program, Title X of P.L. 101-549, the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note, and P.L. 102-389, EPA's 1993 Appropriations Act enacted on October 6, 1992, 42 U.S.C. 4370d, contain exemptions for Indian Tribes.

D. Paperwork Reduction Act

The information collection requirements in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An Information Collection Request (ICR) document will be prepared by EPA (ICR No-.), and a copy may be obtained after it has been prepared from Sandy Farmer by mail at Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW, Washington, DC 20460, by email at farmer.sandy@epamail.epa.gov, or by calling (202) 260-2740. A copy will also be available to be downloaded off the internet at http://www.epa.gov/icr.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden including through the use of automated collection techniques. Send comments on the ICR to the Director, Collection Strategies Division; U.S. Environmental Protection (2822); 1200 Pennsylvania Ave., NW, Washington, DC 20460: and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, D.C. 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after [Insert date of publication in the FEDERAL REGISTER], a comment to OMB is best assured of having its full effect if OMB receives it by [Insert date 30 days after publication in the FEDERAL REGISTER]. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

E. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 USC 601 et. seq.

Today's proposed rule is not subject to the RFA, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. As a grants-related rule, this rule is not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(a)(1). Nor is there any other statute which requires EPA to undergo notice and comment for this rulemaking.

Although this proposed rule is not subject to the RFA, EPA nonetheless will assess the potential of this rule to adversely affect small entities, which include small businesses, small not for profit enterprises and small governmental jurisdictions. At the outset, it is important to note that EPA's SBE/MBE/WBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals, among others (e.g., HBCUs etc.).

Accordingly EPA believes that this proposed rule would affect a substantial number of small entities.

However, if the proposed exemption from the fair share negotiations process is adopted for grants of $100,000 or less, EPA believes that the effect on small entities, including small government jurisdictions, would be minimal. Additionally, under this rulemaking proposal, small entity recipients would be able to use State Agency negotiated MBE/WBE goals if such recipients solicit bids/offers from a substantially similar geographic market as that State Agency. Accordingly, EPA believes that the economic impact of this rule, if enacted, on small entities should be minimal.

In EPA's view this rule, would not affect the total funds or business opportunities available to small businesses that seek to work in EPA financial assistance programs. To the extent that the provisions in this rulemaking proposal (e.g., with respect to changes in the methods used to set goals) lead to different goals than those under EPA's current program policy, some firms may gain and others lose, business. EPA is in the process of trying to estimate the number of MBE firms who would be affected by the proposals MBE Certification change.

EPA is unaware of any data which would enable the Agency, at this time to measure the distributive effects of the rulemaking proposal on various types of small entities.

F. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. This regulation contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The UMRA excluded from the definition of "Federal intergovernmental mandate" duties that arise from conditions of federal assistance.

Pursuant to section 203 of the UMRA, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. If the proposed exemption from the fair share negotiations process is adopted for grants of $100,000 or less, EPA believes that there would be minimal impacts on small entities, including small government jurisdictions. Additionally, under this rulemaking proposal, small entity recipients would be able to use appropriate State Agency-negotiated MBE/WBE goals if such recipients solicit bids/offers from substantially the same relevant geographic market as that State Agency. Therefore, this rule does not meet the threshold test for application of Section 203 of UMRA.

G. Protection of Children From Environmental Health Risks and Safety Risks Under Executive Order 13045

Executive Order 13045 applies to any rule that is determined to be: (1) "economically significant"as defined under Executive Order 12866, and (2) concerns any environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA has determined that the proposed rule is not a covered regulatory action because it is not economically significant and it does not involve decisions based on environmental health or safety risks. As a result, the proposed rule is not subject to the requirements of the Executive Order.

H. National Technology Transfer And Advancement Act.

Under Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), EPA is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. Where available and potentially applicable voluntary consensus standards are not used, the Act requires EPA to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

EPA does not believe that this proposed rule addresses any technical standards subject to NTTAA. Commenters who disagree with this conclusion should indicate how the Notice is subject to the Act and identify any potentially applicable voluntary consensus standards.

List of Subjects

40 CFR Part 30

Environmental protection, Administrative practice and procedure, Grant programs - environmental protection, Reporting and recordkeeping requirements.

40 CFR part 31

Accounting, Administrative practice and procedure, Grant programs, Indians, Intergovernmental relations. Reporting and recordkeeping requirements.

40 CFR Part 33

Grant programs - environmental protection.

40 CFR Part 35

Grant programs - environmental protection. Grant programs - Indians, Hazardous waste, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 40

Research and Demonstration Grants - Projects involving construction

Dated: , 2000
Carol M. Browner,
Administrator

For the reasons set out in the preamble, the U.S. Environmental Protection Agency proposes to [mention deleting material and adding Part 33].